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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES E. GILBERT, *et al.*,
Petitioners,
v.
RICHARD J. HOMAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR AMICUS NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the due process clause requires that a tenured public employee receive notice and an opportunity to respond prior to being indefinitely suspended without pay solely on the basis of his arrest?

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BRIEF FOR AMICUS NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*[1]

Amicus, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive collective bargaining representative of approximately 150,000 employees of the federal government nationwide. NTEU and the employees it represents have a vital interest in the resolution of the issue presented in this case—whether the due process clause requires that a tenured public employee receive some kind of hearing prior to being indefinitely suspended without pay solely on the basis of his arrest.

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[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.

In the federal sector, except in cases involving the national security, tenured employees are guaranteed notice and an opportunity to respond in every instance before they are indefinitely suspended without pay. 5 U.S.C. 7503; 7513(b); 7532.[2] These guarantees do not interfere with the government's legitimate interests, for federal law specifies that—"[w]hen the circumstances require that the employee be kept away from the worksite"—the employee may be placed in a non-duty status, with pay, for as long as is necessary to effect the action. 5 C.F.R. 752.404 (d)(1) (1996). As we show below, the procedures provided in the federal sector strike the proper balance between the competing public and private interests under this Court's due process clause jurisprudence.

SUMMARY OF ARGUMENT

The due process clause generally requires that—notwithstanding an arrest—tenured public employees who are suspended indefinitely must receive notice and an opportunity to respond before they are deprived of pay. Affirmance of the court of appeals' decision is consistent with this Court's precedent, which recognizes a strong presumption in favor of pre-deprivation hearings, and requires a showing of exigency to overcome that presumption.

A. As this Court has repeatedly held, the "root requirement" of the due process clause is " 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' " *Cleveland*

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[2] Pursuant to 5 U.S.C. 7513(b), where an agency proposes to suspend an employee for more than 14 days, it must provide 30 days advance written notice, a reasonable time (not less than 7 days) for the employee to answer orally and in writing, and a written decision with specific reasons, at the earliest practicable date. Where there exists "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed," the notice period may be reduced (5 U.S.C. 7513 (b)(1)), but the other requirements still apply. Suspensions for 14 days or less must also be preceded by notice, a reasonable time to answer orally and in writing, and a written decision. 5 U.S.C. 7503(b).

Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (original emphasis)). The Court "tolerate[s] some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake. . . .'" *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 501 (1993) (quoting *Boddie*, 401 U.S. at 379).

Contrary to the arguments of the petitioners and their *amici*, including the United States, neither *FDIC v. Mallen*, 486 U.S. 230 (1988), nor *Barry v. Barchi*, 443 U.S. 55 (1979), suggests a retreat by this Court from these principles. At issue in *Barchi* was a horse trainer's entitlement to a pre-suspension *evidentiary* hearing. In fact, as this Court subsequently noted in *Loudermill* (470 U.S. at 542), *Barchi* recognized "the need for some form of pretermination hearing"; Barchi himself had been "given more than one opportunity to present his side of the story." 443 U.S. at 65.

In *FDIC v. Mallen*, which ruled constitutional a statute that authorizes the Federal Deposit Insurance Corporation to suspend summarily an indicted officer of a federally insured bank, the bank officer did not contend that he was entitled to any kind of pre-suspension hearing. 486 U.S. at 240. While the Court chose, nonetheless, to address the issue, its conclusion is entirely consistent with the well-established principles just described.

Thus, the overriding public interest in ensuring public confidence in the banking industry was historic and congressionally recognized. As the Court's decision further emphasized, that compelling governmental interest was "coupled with" the fact of a bank officer's indictment. *Id.* at 241. The indictment represented a probable cause determination by an independent body which would reduce the risk of an erroneous deprivation.

Further, in *Mallen*, the statute did not require that the bank officer be denied pay during the period of his sus-

pension. The determination whether to pay the officer was within the bank's discretion.

B. The court of appeals correctly applied the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), when it held that—notwithstanding an arrest—a tenured employee who is indefinitely suspended is entitled to notice and an opportunity to respond, prior to suffering a loss in pay.

1. Indefinite suspensions without pay are serious deprivations of property. The Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Loudermill*, 470 U.S. at 543 (citations omitted). An employee who is indefinitely suspended may be without a paycheck for weeks or months. He has no predictable source of income and cannot make financial plans. Because he is under a cloud of suspicion, it may be difficult, if not impossible, to find other, temporary employment. Further, he suffers resulting intangible harms, including loss of self-esteem and embarrassment, while he is awaiting the conclusion of the investigation and a decision whether his suspension will be lifted.

2. The second factor examined under *Mathews*—the value of additional procedures in avoiding an erroneous deprivation—also supports the provision of a hearing to tenured employees before they are indefinitely suspended. Providing an employee the opportunity to present his side of the story is "recurringly of obvious value in reaching an accurate decision." *Loudermill*, 470 U.S. at 543. In this case, for example, the University did not have the benefit of Homar's explanation of his innocent presence at the site of the drug raid, or his version of what he told the officers who arrested him.

There is no merit to the argument of petitioners and their *amici* that the likelihood of error absent a hearing is reduced significantly by the fact of an employee's warrantless arrest. As analogous precedent demonstrates, a mere arrest by a police officer does not give rise to reasonable grounds to believe that an individual has com-

mitted a crime. Accordingly, it does not provide sufficient assurances against error to lessen the need for pre-deprivation process.

3. Petitioners failed to articulate, much less demonstrate, that a governmental interest adequate to justify summary suspension without pay is at stake when an employee is arrested. As *amicus* United States recognizes (Br. 24), "interests in law enforcement integrity and public safety . . . address the suitability of Homar remaining in a duty status but . . . do not concern the appropriateness of his being suspended *without pay*." (Emphasis added.)

In fact, suspending an employee with pay is the very solution that this Court suggested in *Loudermill* for removing a potentially hazardous individual from the worksite until a pre-deprivation hearing can be afforded. Because the government has such a less restrictive measure available to protect its interests, it cannot establish the kind of extraordinary circumstances required to justify a summary suspension.

C. Contrary to the contentions of the United States, an affirmance of the decision below will have no impact upon the provisions of the federal statutes that concern the rights of probationary employees. Such employees lack a property interest in their jobs because they may be terminated at will. Any due process requirement this Court may derive will, therefore, not apply to non-tenured, probationary employees of the federal government.

Nor would affirmance of the court of appeals decision cast doubt upon the constitutionality of 5 U.S.C. 7532, which authorizes the heads of certain federal agencies to suspend employees summarily and without pay, in highly limited circumstances, when the interests of national security so require. The justification for that provision—the "extraordinary" circumstances warranting departure from the normal requirements of due process—lies in the vital governmental need to protect the national security.

Indeed, in the national security context, meaningful pre-deprivation hearings may be impractical because they might require disclosure of confidential information and sources to an individual suspected of treason.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY HELD THAT —EXCEPT IN TRULY EXTRAORDINARY CIRCUMSTANCES—THE DUE PROCESS CLAUSE REQUIRES NOTICE AND AN OPPORTUNITY TO RESPOND BEFORE AN INDIVIDUAL IS DEPRIVED OF A SIGNIFICANT PROPERTY INTEREST

Petitioners and their *amici* center their criticism of the court of appeals decision upon its supposed creation of what they call a "per se" rule, requiring a pre-deprivation hearing before any suspension, in every case. In resolving this case, however, the Court need not determine whether such a "per se" rule is appropriate. Instead, the Court should affirm the decision below on the narrower grounds that—notwithstanding an arrest—the due process clause generally requires that tenured public employees who are suspended indefinitely must receive notice and an opportunity to respond before they are deprived of pay.

The establishment of such a general rule would allow for exceptions in cases that involve, for example, the national security. Further, the general rule we urge is entirely consistent with this Court's precedent, including the oft-stated principle that due process is a "flexible" concept. The arguments to the contrary by petitioners and their *amici*, including the United States, are meritless.

A. The "Root Requirement" of the Due Process Clause Is That an Individual Is Entitled to a Hearing *Before* Being Deprived of a Significant Property Interest

1. As this Court has repeatedly observed, an "essential principle" or "root requirement" of the due process clause

is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' " *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (original emphasis)). Thus, while "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 498, 500 (1993); *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 569-570 n.7 (1972); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1281 (1975) (prior opportunity to respond is "fundamental" element of due process).

As this Court recently reaffirmed, the purpose of requiring a pre-deprivation hearing " 'is not only to ensure abstract fair play to the individual.' " *James Daniel Good Real Property*, 114 S. Ct. at 500-01 (quoting *Fuentes*, 407 U.S. at 80-81). " 'Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property. . . .' " *Id.*

"The requirement of notice and an opportunity to be heard," this Court has explained, "raises no impenetrable barrier to the taking of a person's [property]." *Fuentes*, 407 U.S. at 81. Instead, "the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense,

and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Id.*

These essential principles are central to our form of government. As Justice Frankfurter eloquently observed in *Joint Anti-Fascist Refugee Committee v. McGrath*,

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).[3]

B. Exceptions to the General Rule Requiring a Pre-Deprivation Hearing Are Tolerated Only in Truly Unusual or Extraordinary Situations

1. As we have shown, this Court's decisions have been clear that a pre-deprivation hearing is a fundamental and presumptive requirement of the due process clause. While the Court will "tolerate some exceptions to the general rule requiring predeprivation notice and hearing," it will do so "only in 'extraordinary situations where some valid governmental interest is at stake. . . .'" *James Daniel Good Real Property*, 114 S. Ct. at 501 (quoting *Boddie*, 401 U.S. at 379); *see also Fuentes*, 407 U.S. at 90-91 (postponement of hearing may be justified in "truly unusual" and "extraordinary situations" where there is "a

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[3] Justice Frankfurter further noted:

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

341 U.S. at 171-72.

special need for very prompt action"); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 300 (1981) (summary administrative action justified in "emergency situations").

Thus, for example, the Court has not required a hearing prior to emergency action required by the exigencies of war, *Bowles v. Willingham*, 321 U.S. 503, 521 (1944), or bank failure, *Fahey v. Mallonee*, 332 U.S. 245 (1947). Exigent circumstances have been found where immediate action was necessary to protect consumers from contaminated food, *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908), or misbranded drugs, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950). Summary administrative procedures have also been upheld to prevent an " 'imminent danger to the health and safety of the public' " arising out of strip mining. *Hodel*, 452 U.S. at 301 (quoting 30 U.S.C. 1291(8) (1976 ed., Supp. III)).

2. This Court has often observed, as petitioners and their *amici* emphasize, that due process is a "flexible" concept, and that " 'not all situations calling for procedural safeguards call for the same kind of procedure.' " Brief for the United States at 14 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). As the foregoing discussion demonstrates, however, the principle of "flexibility" does not undermine the equally well-established presumption in favor of some kind of pre-deprivation hearing.

The principle of "flexibility" is most pertinent to a determination of the kind of hearing that will be required, as opposed to its timing. As this Court explained in *Fuentes*, 407 U.S. at 82, "the Court has held that due process tolerates variances in the *form* of a hearing . . .," but it "has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes place" (original emphasis).

Further, the principle of "flexibility" does not prevent the establishment of general rules to cover particular

categories of cases. *Loudermill* itself established a general rule requiring a pre-deprivation hearing in cases where tenured public employees are terminated. There is no reason a similar general rule should not be established with respect to indefinite suspensions.

C. *FDIC v. Mallen* and *Barry v. Barchi* Do Not Establish a Lower Burden of Justification for Summary Suspensions

In its brief, the United States ultimately pays lip service to *Loudermill*'s reconfirmation of the " 'root requirement' of the Due Process Clause"—requiring that an individual be given an opportunity for a hearing "*before* being deprived of a significant property interest." Brief for the United States at 23 (quoting *Loudermill*, 470 U.S. at 542 (original emphasis)). Yet, at the same time, it contends that—so long as adequate post-deprivation procedures are available—no hearing of any kind is required prior to the indefinite suspension of a government employee where government's interest is what the United States calls "weighty." *Id.* at 14. It purports to rely upon *FDIC v. Mallen*, 486 U.S. 230 (1988), and *Barry v. Barchi*, 443 U.S. 55 (1979), to support its position.

The effort of the United States to transform into a sweeping rule the limited exception to the "root requirement" of due process finds no support in *Mallen* or *Barchi*. Neither decision suggests a retreat by this Court from its long-standing recognition that a pre-deprivation hearing is required by the due process clause, except in truly extraordinary circumstances.

1. In *Barchi* (a pre-*Loudermill* case), a race horse trainer challenged the procedures under which his license was suspended. Under state law, when a post-race test of a horse revealed the presence of drugs, it was presumed that the trainer was responsible (either by intentionally administering the drug, or through negligence). The statute provided for an immediate suspension of a trainer's license, following a positive test. It also provided for

a post-suspension hearing, but gave no time limit for the holding of a hearing.

Barchi argued that under the due process clause he was entitled to a pre-suspension *evidentiary* hearing. The Court rejected *that* proposition. 443 U.S. at 64. It concluded that the state had an overriding interest in ensuring the integrity of the horse racing industry that would justify the imposition of an interim suspension, pending a prompt administrative or judicial hearing. *Id.*

Barchi, like *Mathews v. Eldridge*, 424 U.S. 319 (1976), thus involved the question whether a full evidentiary hearing was required prior to the governmental deprivation at issue. *Barchi* did not uphold the right of the state authorities to suspend a trainer's license with no pre-deprivation process at all.

On the contrary, as this Court noted in *Loudermill* (470 U.S. at 542), *Barchi* is one of this Court's many decisions that recognize "the need for some form of pre-termination hearing." The *Barchi* Court explicitly noted that "although Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging, 16 days elapsed prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story. . . ." 443 U.S. at 65.

2. In *FDIC v. Mallen*, the other case so heavily relied upon by petitioners and their *amici*, including the United States, this Court upheld the constitutionality of a statute that permits the Federal Deposit Insurance Corporation to suspend an indicted officer of a federally insured bank. The statute did not provide any pre-suspension process, but instead required the FDIC to hold a hearing within 30 days of a request by the bank officer, and to issue a decision no more than 60 days after the hearing.

a. The actual issue in *Mallen* was whether the post-suspension hearing was sufficiently prompt to satisfy due process. As this Court's opinion states, the bank officer did not contend that he was entitled to an opportunity for

any kind of hearing before the suspension went into effect. 486 U.S. at 240.

To be sure, this Court went on to discuss, in *dicta*, the process to which the bank officer might be entitled before the imposition of the suspension. But the nature of the Court's discussion suggests that it was addressed to whether Mallen could have argued for an elaborate hearing prior to his suspension (as did the horse trainer in *Barchi*).

Thus, the Court extensively analogized Mallen's case to that of Barchi. It went on to reject the need for pre-deprivation process in *Mallen* for the same reasons it had rejected the need for a full evidentiary hearing prior to the deprivation in *Barchi*. 486 U.S. at 241-42.

As previously described, *Loudermill* relied upon *Barchi* for the proposition that the due process clause requires some kind of pre-deprivation process short of a full evidentiary hearing. 470 U.S. at 542. It would be directly contrary to *Loudermill* for the *Mallen* Court to have cited *Barchi* for the opposite proposition—that the bank president was entitled to no pre-deprivation process of any kind. *Loudermill*, *Mallen*, and *Barchi* can only be harmonized by reading the *Mallen dicta* as responding to any suggestion that a full evidentiary hearing could be required prior to the suspension.

b. In any event, even if the *Mallen dicta* were addressed to the bank officer's right to any kind of pre-deprivation process at all, the *Mallen* case represents the kind of extraordinary situation that would justify a summary suspension under the principles we have described. Thus, in *Mallen* this Court gave deference to congressional findings that "prompt suspension of indicated bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions." 486 U.S. at 241.

Because of its extreme sensitivity, banking has been "one of the longest regulated and most closely supervised of public callings." *Fahey v. Mallonee*, 332 U.S. 245, 250

(1947). The entire federal deposit insurance system was created because, "[f]aced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings." *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986). Congress gave the FDIC the summary suspension power in the context of its repeated findings of a powerful correlation between bank officer fraud and abuse and commercial bank failures. *E.g.* H.R. Rep. 95-1383, 95th Cong., 2d Sess. 10 (1978); H.R. Rep. 98-1137, 98th Cong., 2d Sess. 7 (1984).

It was only when this historical and congressionally mandated interest in maintaining confidence in the banking industry was "coupled with factors minimizing the risk of an erroneous deprivation" (*Mallen*, 486 U.S. at 243) that the Court found the existence of the extraordinary circumstances required to permit a summary deprivation of property. Specifically, the suspension of bank officers is based upon the determination by an independent body (a grand jury) that there was probable cause to believe that the officer had committed a felony.

Further, unlike the governmental interests at stake in this case, those at issue in *Mallen* could not be satisfied in any way short of imposing a summary suspension, without pay. The fact that the government is the employer here distinguishes this case from *Mallen*. The government can meet an interest in removing its own employees from the worksite without depriving them of pay because the decision whether to afford them pay is within its discretion. In *Mallen*, the government could only meet its interests in removing the indicted bank officer from his post by requiring the bank to suspend him. The government did not mandate that he not be paid; that decision belonged to the bank.

In short, *Mallen* does not stand for the proposition that a mere "weighty" government interest will suffice to authorize departure from the fundamental requirement of a pre-deprivation hearing. *Mallen* is, instead, consistent

with this Court's recognition both before and after that case (*see James Daniel Good Real Property*, 114 S. Ct. at 501), that only extraordinary circumstances justify the deprivation of property without some kind of prior process. As we now show, the indefinite suspension of a tenured public employee, based upon his arrest, does not present extraordinary circumstances justifying the lack of pre-deprivation procedures.

II. THE ARREST OF AN EMPLOYEE DOES NOT PROVIDE AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING A SUMMARY SUSPENSION WITHOUT PAY

The petitioners and their *amici* contend that an employee's arrest provides a sufficient justification for departing from the "root requirement" of the due process clause, and for permitting a public employer to summarily suspend him, without pay. The strength of their contention is measured by application of the three factors this Court set forth in *Mathews v. Eldridge*: 1) the private interests affected by the indefinite suspension; 2) the risk of the erroneous deprivation of those interests through the procedures used; and 3) the governmental interests at stake, including the fiscal and administrative burdens that would be presented by additional procedures. 424 U.S. at 335.

As we now show, the *Mathews* analysis confirms that—notwithstanding an arrest—a tenured employee who is indefinitely suspended is entitled to notice and an opportunity to respond, prior to suffering a loss in pay. Categorically, indefinite suspensions without pay are serious deprivations of property. Further, providing an employee with an opportunity to respond would assist the public employer in making the correct decision as to whether that deprivation is warranted. Finally, as *Loudermill* recognized, the government's important interests in removing a potentially dangerous employee from the worksite can be met by suspending the employee with pay.

Accordingly, an employee's arrest does not provide the extraordinary circumstances required to depart from the "root requirement" of the due process clause, mandating a pre-deprivation hearing. This Court should affirm the court of appeals decision to the extent that it so held.

A. An Indefinite Suspension Without Pay Is a Serious Deprivation of Property

1. As this Court observed in *Loudermill*, "the significance of the private interest in retaining employment cannot be gainsaid." 470 U.S. at 543. The Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Id.* (citations omitted). An employee who is indefinitely suspended can go for weeks or months without a means of livelihood. His financial circumstances are completely uncertain.

Contrary to the suggestions of petitioners (Pet. Br. 19) and the United States (Br. 18, 20), the interests of an employee who is indefinitely suspended without pay are no less weighty than those of an employee who is terminated. By definition, such an employee has no way of knowing how long he will be deprived of his livelihood. He cannot really look for another job, because he is uncertain whether and when he will be reinstated to his current job. And with no knowledge of when (if ever) he will be reinstated, he cannot make any financial plans or commitments. Any search for temporary work, moreover, will be burdened by the uncertainty of his employment status.

In fact, a public employee who is indefinitely suspended, pending further investigation, has much in common with one who is "temporarily discharged" pending a hearing, as were the employees in *Loudermill*. *See Brock v. Roadway Express*, 481 U.S. 252, 264 (1987) (plurality opinion) (characterizing proposed termination in *Loudermill* as a "temporary discharge"). The Court's observation in *Loudermill*—that "while a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable

circumstances under which he left his previous job" (470 U.S. at 543)—is equally applicable to an indefinite suspension.

The suggestion of the United States that such a suspension "reflects less seriously on the employee's reputation than does a termination for cause" (U.S. Br. 18) is clearly incorrect. An employee who is suspended indefinitely while he is being investigated is under a cloud of open-ended suspicion. The worst suspicions of a prospective employer, not to mention the employee's colleagues, friends, and neighbors, can be assumed true.

There is similarly no merit to petitioners' argument that what is a stake here is merely "the interest in receiving an uninterrupted paycheck," an interest alleged by petitioners to be of relatively little significance because "the deprivation was temporary, the period without any paycheck of brief duration, and the loss—money—easily replaceable." Pet. Br. 19. Depriving an employee of even part of his wages "may as a practical matter drive a wage-earning family to the wall." *Sniadach*, 395 U.S. at 341-42. As Justice Marshall explained in *Arnett v. Kennedy*, "[many] workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. . . . [T]he loss of income for even a few weeks may well impair their ability to provide the essentials of life—to buy food, meet mortgage or rent payments, or procure medical services." 416 U.S. 134, 220-221 (1974) (dissenting opinion).[4]

Combined with these tangible injuries, there are the obvious intangible harms—loss of self-esteem, embarrassment, and a sense of helplessness. As Justice Marshall suggested in *Loudermill*, these injuries cannot ever be

[4] Even if the suspension ultimately lasts for a relatively short period, there is no way of knowing that at its outset. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes*, 407 U.S. at 82 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)).

compensated by a subsequent award of money. *Loudermill*, 470 U.S. at 550 (concurring opinion).

This Court has recognized that one of the "central concerns of procedural due process" is "the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). That concern is frustrated where an employee is summarily and indefinitely suspended, solely on the basis of an arrest. Leaving an employee in a state of financial limbo and denying him an opportunity to seek redress clearly run counter to "both the appearance and reality of fairness," conditions which " 'generat[e] the feeling, so important to a popular government, that justice has been done.' " *Id.* (quoting *Joint Anti-Fascist Committee*, 341 U.S. at 172 (Frankfurter, J., concurring)).

B. Allowing the Employee an Opportunity To Respond Would Be of Value in Reaching an Accurate and Appropriate Decision

1. The second factor examined under *Mathews* is the value of additional procedures in avoiding an erroneous deprivation. 424 U.S. at 335. Erroneous deprivations can occur, of course, even when decision makers are acting "in the utmost good faith." *Goss v. Lopez*, 419 U.S. at 580. Decision makers "frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed." *Id.* "The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference. . . ." *Id.* at 580.

In *Loudermill*, this Court found that providing an employee the opportunity to present his side of the story before he is terminated is "recurringly of obvious value in reaching an accurate decision." 470 U.S. at 543. As the Court observed, "dismissals for cause will often involve factual disputes." *Id.* Moreover, "[e]ven when the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful oppor-

tunity to invoke the discretion of the decision maker is likely to be before the termination takes effect." *Id.*

2. These considerations are present when a decision is being made about what action to take against an employee on the basis of an arrest. In this case, for example, the decision maker lacked the benefit of Homar's explanation of his innocent presence at the scene of the police raid. *Cf. Lopez,* 419 U.S. at 580, n.9 (student suspended on the basis of arrest at demonstration should have been allowed to explain her presence among those arrested to principal before imposition of suspension). Homar did not have a chance to provide his side of the story regarding statements he did or did not make to the police. Further, Homar had no opportunity to invoke the discretion of the University to continue to pay him while its investigation was proceeding or to reassign him to another position.

Whether Homar would have been able to convince the decision maker that he was innocent, or that something less than a suspension without pay was warranted, is not a relevant factor. "The right to a hearing does not depend on a demonstration of certain success." *Loudermill,* 470 U.S. at 544 (quoting *Carey v. Piphus,* 435 U.S. 247, 266 (1978)).

3. There is no merit to the arguments of the petitioners and their *amici* that an arrest of an employee provides sufficient assurances against error to lessen the need for pre-deprivation process. In this case, for example, the charges against Homar were dropped at the preliminary hearing within days after the arrest, a result entirely consistent with his contentions that he just happened to be in the wrong place at the wrong time.

A warrantless arrest by a police officer of an individual who happens to be at the site of the execution of a search warrant does not provide even reasonable grounds to believe that the individual has, in fact, committed a crime. *See Dunnington v. Department of Justice,* 956 F.2d 1151, 1157 (Fed. Cir. 1992) (observing that "it is generally

agreed that an arrest by police authorities does not, by itself, provide reasonable cause to believe that an employee has committed a crime for which imprisonment could result"). Indeed, this Court observed in *Schware v. Board of Bar Examiners of the State of New Mexico,*

> The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of the offense.

353 U.S. 232, 241 (1957).[5]

Further, " '[z]eal in tracking down crime is not in itself an assurance of soberness of judgment'." *Gerstein v. Pugh,* 420 U.S. 103, 118 (1975) (quoting *McNabb v. United States,* 318 U.S. 332, 343 (1943)). For that reason, this Court has required that any significant restraint on liberty following an arrest must be based upon an independent determination of probable cause. *Gerstein,* 420 U.S. at 125. No less should be required to indefinitely deprive an individual of his livelihood.[6]

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[5] Even had there been a warrant issued, such an *ex parte* review of probable cause has been held not to establish reasonable grounds to believe an employee has committed a crime. *Dunnington,* 956 F.2d at 115; (even where arrest warrant issued, federal agency should not undertake summary suspension of employee without further investigation); *cf. James Daniel Good Real Property,* 114 S. Ct. at 502 (*ex parte* proceeding before magistrate provides inadequate protection against erroneous seizure of property).

[6] An individual's arrest cannot be equated to a grand jury indictment. As this Court observed in *Mallen,* "[t]he returning of the indictment establishes that an independent body has determined that there is probable cause to believe that the officer has committed a crime. . . ." 486 U.S. at 244. *See also Gerstein,* 420 U.S. at 118, n.19.

Indeed, the fact of an arrest lacks even the probative value of the expert's affirmance in *Barchi* that the trainer's horse had been drugged. The expert's opinion, as this Court noted (443 U.S. at 65), was based upon objective scientific evidence. An on-the-scene arrest by a police officer is frequently based upon his subjective impressions.

4. In their brief on the merits, the petitioners argue that University officials were required by law to suspend Homar without pay upon his arrest, so that no purpose would have been served by a pre-suspension hearing. They rely upon section 7.173 of Title 4 of the Pennsylvania Code, which provides that:

> As soon as practicable after an employe has been formally charged with criminal conduct related to his employment with the Commonwealth or which constitutes a felony, the employe shall be suspended without pay. If the charge results in conviction in a court of law, the employe shall be terminated.

Section 7.172 states that "an employe shall be deemed to be formally charged with criminal conduct when he has been arrested . . . ."

These provisions—which are taken from "the Governor's Code of Conduct"—were never relied upon or even cited previously by the Commonwealth and, therefore, need not even be considered by this Court. *See Loudermill*, 470 U.S. at 539, n.5 (rejecting state's contention that employee lacked property interest in part because it was not raised below). Further, the provisions the University is now citing are not statutory; the Code is an executive order that has been codified as part of the Pennsylvania Code, and it lacks the force and effect of law. *State Correctional Institution at Graterford, Department of Corrections v. Brumfield*, 594 A.2d 852, 856 (Pa. 1991).

Further, petitioners' new position—that the provision required the University to immediately suspend Homar without a hearing—does not comport with the record in this case. Petitioner Levanowitz testified that, while he was "guided" by unspecified provisions of the Governor's Code, he made the decision to suspend Homar without pay on his own, after consulting with labor relations specialists.[7]

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[7] In his deposition, Levanowitz testified that he referred to an employee handbook, language in the collective bargaining agree-

Petitioner's new-found reliance upon the Governor's Code is also unconvincing given that the suspension of Homar went on for weeks after the charges against him were dismissed. If the suspension were based upon the fact of arrest alone, then no justification for it remained after the charges were dismissed.

Petitioners' resort to the Governor's Code is also not supported by the language of the provision. It states that a suspension should be imposed "as soon as practicable" after an arrest. 4 Pa. Code § 7.173. The employer thus retains the discretion to afford an employee a prior opportunity to show that the arrest was improper, that the underlying charges were unfounded, or that the suspension without pay was otherwise unwarranted.

In fact, if the Code were interpreted to deprive an employer of this discretion, it would likely violate due process. A tenured employee, such as Homar, may only be suspended or disciplined for just cause. By definition, an improper arrest would not supply just cause for discipline. Just cause ultimately requires a finding of guilt. If the mere fact of an arrest can justify failing to provide any hearing, then the employee is denied an opportunity to disprove an element essential to the just cause determination—that he actually committed the offense with which he has been charged. *See Bell v. Burson*, 402 U.S. at

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ment, labor relations journals, and the like in making suspension decisions. Ct. App. J.A. at 127-128. He mentioned the "Governor's Codes of Conduct," as a "Commonwealth" (as opposed to "University") policy regarding suspensions. *Id.* at 128. Levanowitz was specifically asked if he was "obliged" to follow the Code in suspending an employee. *Id.* at 129. He responded that "I guess, I'm not sure that I would choose the word obliged, but I did refer to this and let it guide my actions somewhat in this case, yes." *Id.* He subsequently testified that he had consulted the Code of Conduct and received advice from "Labor Relations people" in the "Chancellor's office" when deciding whether to suspend Homar. *Id.* at 137. He stated that the "Labor Relations people" "concurred with my feeling that I had already arrived at, was that we should suspend." *Id.* at 137-138. He did not recall, however, whether they had discussed suspension with or without pay. *Id.*

541-542 (state may not summarily suspend license of uninsured driver who fails to post bond based solely on fact of accident; driver is entitled to pre-suspension hearing regarding fault).[8]

In any event, even if petitioners' interpretation of the Code's requirements were correct, their argument is classic bootstrapping. The petitioners are using the employer's own unilaterally imposed policy of summary suspension to define what process is due. They would have the Court hold that—if the public employer (in this case, the Governor) decides to summarily suspend on the basis of an arrest—then the due process clause requires no more. That is analogous to the approach that this Court found wanting in *Loudermill*, when it rejected the state's argument that a property right "is defined by and conditioned on, the legislature's choice of procedures for its deprivation." 470 U.S. at 539. *See also Vitek v. Jones*, 445 U.S. 480, 490-91 (1980).

C. The Government's Interests Do Not Require Suspension Without Pay

1. The final factor in the analysis is the governmental interests at stake, including the function involved and the fiscal and administrative burdens of additional or different procedures. *Mathews*, 424 U.S. at 335. The governmental interests articulated by petitioners to support sum-

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[8] In *Dixon v. Love*, 431 U.S. 105 (1977), the Court upheld a state statute that provided for the summary revocation of the drivers' licenses of persons who were repeatedly convicted of traffic violations. The Court found that a pre-revocation hearing would be of little use because suspension and revocation decisions under the statute were largely automatic. 431 U.S. at 113. Significantly, in *Dixon*, unlike *Burson* (and unlike this case), the individuals subjected to the deprivation had already had an opportunity for a hearing on the question of their culpability. The Court specifically noted that the convicted traffic offenders had the opportunity to obtain full judicial hearings in connection with the traffic convictions that formed the basis for their suspension. *Id.* The result in *Dixon* surely would have been different had the statute provided for the summary suspension of drivers' licenses based upon mere arrest for traffic violations.

mary suspension without pay include the preservation of public confidence in the campus police force, ensuring effective law enforcement, and maintaining the morale of fellow officers. Pet. Br. 22.

As *amicus* United States recognizes (Br. 24), "interests in law enforcement integrity and public safety . . . address the suitability of Homar remaining in a duty status but . . . do not concern the appropriateness of his being suspended *without pay*" (emphasis added). These articulated interests clearly could have been satisfied by suspending Homar with pay, until such time as a limited *Loudermill*-type hearing were held. That is precisely the practice in the federal sector where, by statute and regulation, tenured employees are kept in a pay status for a sufficient amount of time to provide them with an opportunity to respond, orally or in writing, to the charges against them; the only exception is for cases involving national security. *See supra*, page 2, n.2.

Further, suspending an employee with pay is the very solution that this Court suggested in *Loudermill*, when it rejected the argument that the government might have an overriding interest in terminating an employee without any prior process in cases where the employer "perceives a significant hazard in keeping the employee on the job." 470 U.S. at 544-545. The *Loudermill* Court specifically observed that, in such cases, a public employer can avoid "the problem" of having to keep the employee on the job, by suspending him *with* pay. *Id.*

The Court's specification that the suspension be *with* pay was not inadvertent or meaningless. It obviously suggests, as the court of appeals recognized, that a summary suspension without pay would raise constitutional concerns.

In any event, while petitioners and their *amici* are correct that *Loudermill* did not hold that a public employer must provide pay to any employee that it summarily suspends, the court of appeals did not rely upon the passage at issue for that purpose, nor do we. Instead, it cited the passage to illustrate this Court's con-

clusion that the government's interests in safety, public confidence, and the like, can be met without denying employees a pre-deprivation hearing by suspending them with pay.

In this case, the governmental interest to be weighed is not the interest in suspending an employee to ensure safety, public confidence, and effective law enforcement. Rather, it is the specific interest in suspending an employee *without* pay to meet those goals. *See James Daniel Good Real Property*, 114 S. Ct. at 502. Because the government has "less restrictive measures" available to protect its goals (*e.g.*, suspension with pay), it cannot establish the kind of "exigent circumstances" necessary to justify a summary suspension. *Id.* at 505; *see also Sniadach*, 395 U.S. at 339 (state salary garnishment statute constitutionally defective because it is not narrowly drawn to meet unusual government interest).

2. Further, "affording the employee an opportunity to respond prior to [an indefinite suspension without pay] would impose neither a significant administrative burden nor intolerable delays." *Loudermill*, 470 U.S. at 544. The kind of hearing described in *Loudermill* is not an elaborate or time-consuming one; it merely requires that an employee receive "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. In the federal sector, such hearings are routinely held within a week of the initial suspension; it is not inconceivable that a shorter period could be reasonable, depending upon the circumstances.

The *amici* States argue that requiring them to pay suspended employees pending a hearing, "however contemptible their behavior," would damage the morale of their co-employees and create outrage among the taxpaying public. States Br. 11-12. Citing *Mathews*, they also contend that it would be cost-prohibitive to continue to provide pay to employees pending a hearing. *Id.* at 10-11.

Amici's points might be well-taken if suspended employees were paid for an extended period of time—for example, as was argued in *Mathews*, until a full-blown evidentiary hearing were held. But what is at issue here is perhaps a few days of pay. Indeed, if such hearings avoid erroneous suspensions, they will actually save the employer money by eliminating the need to pay a substitute employee for an extended period of time, as well as back pay to an employee wrongfully suspended.

Further, both an employee's co-workers and the public can certainly appreciate that, under our system, there are "higher values than speed and efficiency." *Fuentes*, 407 U.S. at 90, n.22 (*quoting Stanley v. Illinois*, 405 U.S. at 656). They can also understand that "these rather ordinary costs [of a prior hearing] cannot outweigh the constitutional right" (*id.*), and that an individual is entitled to some opportunity to present his side of the story before he is judged to have behaved "contemptibly." [9]

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[9] There is no merit to the contention of the United States that the Court should remand the case for further findings and a reapplication of the *Mathews* balancing test. U.S. Br. at 23-25. The court of appeals did apply the *Mathews* factors; the United States simply disagrees with the balance the court struck. As we have shown, however, the court of appeals correctly determined that—because the University could have suspended Homar with pay briefly, to allow time for him to respond to the charges—it failed to provide an adequate justification for denying Homar a predeprivation hearing.

Further, contrary to the suggestions of the United States (Br. 24), the record is clear that Homar's pay was interrupted when he was indefinitely suspended, for the University had to provide him with backpay twice. Nor is there a need for an examination of the collective bargaining agreement, as the United States suggests (Br. 24), because both parties agreed that Homar—who had completed a six-month probationary period—was a "tenured" employee who had a property interest in employment. *See* Pet. Br. 4. In addition, the petitioners had ample opportunity below to establish their interest in summary suspension without pay (*see* U.S. Br. 24); they attempted to do so by citing governmental interests in effective law enforcement, public confidence, and the like. Finally, there is no reason to address the adequacy of the

III. A GENERAL RULE REQUIRING A PRE-SUSPENSION HEARING NOTWITHSTANDING A TENURED EMPLOYEE'S ARREST IS CONSISTENT WITH FEDERAL CIVIL SERVICE LAWS AND DOES NOT THREATEN CONGRESSIONAL CHOICES REGARDING PROBATIONARY EMPLOYEES OR NATIONAL SECURITY-BASED SUSPENSIONS

In its brief (at 21-23), the United States contends that an affirmance of the decision below would intrude upon congressional choices to deny pre-suspension hearings to probationary federal employees and to authorize summary suspensions of employees suspected of treason. Both of these contentions are meritless.

A. The federal government's argument regarding the due process rights of probationary employees is a red herring. Due process does not apply unless an employee has a property interest in his position. Employees who may be terminated at will lack a property interest in their jobs. *See Board of Regents v. Roth*, 408 U.S. at 576-78; *Bishop v. Wood*, 426 U.S. 341 (1976).

The lower courts have routinely equated probationary status with at-will employment, and held that probationary employees lack a property interest in their jobs. *Orange v. District of Columbia*, 59 F.3d 1267, 1274 (D.C. Cir. 1995); *Finley v. Giacobbe*, 79 F.3d 1285, 1297-98 (2d Cir. 1996); *Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1307 (3d Cir. 1993).

It is well established in the federal sector that probationary employees serve at the will of the federal employer and may be terminated for any reason (except of course, a prohibited one, such as racial discrimination). *See United States Department of Justice v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983). The Tenth Circuit has specifically held that probationary federal employees do not have a prop-

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post-deprivation process, for the due process violation alleged in this case was the failure to provide any pre-deprivation process.

erty interest in their jobs. *Walker v. United States*, 744 F.2d 67 (1984).

The argument of the United States regarding the effect of affirmance of the court of appeals decision upon the rights of federal probationary employees is, therefore, without merit. Any due process requirement that Court may discern will not apply to non-tenured, probationary employees.

B. A decision by this Court confirming a general rule that requires a limited pre-deprivation hearing before an indefinite suspension would also not cast doubt on the validity of the federal government's procedures in the national security context, as urged by the United States (Br. 23). The applicable provision, 5 U.S.C. 7532, authorizes the heads of certain federal agencies to suspend an employee summarily and without pay when they determine that the interests of national security so require.

Under this provision, there is no pre-suspension process. The employee is entitled to notice of the reasons for the action only "[t]o the extent that the head of the agency determines that the interests of national security permit." 5 U.S.C. 7532(a). The employee is also entitled, after the suspension, to a written statement of the charges against him, as specific "as security considerations permit;" an opportunity to answer; a hearing; a review of his case by the agency head; and a written decision by the agency head. *Id.* at 7532(c).

Section 7532 was originally a wartime measure that conferred a power of summary *removal*. When the wartime measure was permanently reenacted in 1950, the summary removal provisions were amended to provide for summary suspension, with procedural protections to follow. *See* S.Rep. No. 1155, 80th Cong., 2d Sess. 3 (1948); H.R. Rep. No. 2330, 81st Cong., 2d Sess. 2, 4 (1950); S.Rep. No. 2158, 81st Cong., 2d Sess. (1950), *reprinted in* 1950 U.S. Cong. Code & Admin. News 3278, 3279. Even as modified, the procedures of section 7532 are "harsh and

drastic." *Department of the Navy v. Egan*, 484 U.S. 518, 533 (1988). They are appropriately invoked only in a "special class of national security cases," in response to "an immediate threat of harm to the 'national security.' " *Cole v. Young*, 351 U.S. 536, 546 (1956), *quoted in Carlucci v. Doe*, 488 U.S. 93, 102 (1988). Such procedures are reserved for cases where "normal for cause dismissal procedures could cause serious damage to the national security." *Doe v. Cheney*, 885 F.2d 898, 905 (D.C. Cir. 1989); *see also Cole*, 351 U.S. at 546 (summary suspension is for cases where an employee "could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges").[10]

The justification for such drastic procedures—the "extraordinary" circumstances warranting departure from the normal requirements of due process—lies in the vital governmental need to protect the national security. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). To preserve the Nation from the "immediate threat of harm" (*Carlucci v. Doe*, 488 U.S. at 102) and to avoid the disclosure of highly sensitive information, summary procedures may be the only possible course of action.

In this context, a meaningful pre-deprivation hearing might require the agency to disclose confidential information and sources to an individual who is suspected of treason. To meet the governmental need for confidentiality, the statute itself permits an agency head to disclose

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[10] Normally, agencies respond to national security threats by revoking an employee's security clearance and then employing the ordinary disciplinary procedures under 5 U.S.C. 7513, with their accompanying procedural protections. It is well settled that federal employees have no property interest in their security clearances. *Department of Navy v. Egan*, 484 U.S. at 528. Following the revocation of a security clearance, an employee is subject to removal for "cause" because he is no longer able to perform the functions of his position. *Id.* at 530; *Doe v. Cheney*, 885 F.2d at 905-06.

the reasons for a summary suspension only to the extent that the agency head "determines that the interests of national security permit." 5 U.S.C. 7532(a). Where material information must be suppressed in the interest of national security, the conduct of a hearing prior to suspension without pay would be a meaningless formality.

In short, suspensions for national security reasons under section 7532 are in a unique category. This Court can craft a general rule applicable to indefinite suspensions outside the national security context. Such a rule would have no impact upon national security cases, just as the rule in *Loudermill* regarding terminations does not necessarily determine the result in the context of a dismissal for national security reasons.

CONCLUSION

The decision of the court of appeals should be affirmed.

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